

A BIT of resistance

A response to Prof. Prabhash Ranjan's plea for embedded liberalism

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In our current framework of post-truth/factual/reality politics, much of the debates surrounding crucial issues of both domestic and international governance are invariably couched in an inflexible, partisan and for most parts, in parochial terms. There is either utter disdain towards opposing perspectives or deliberate display of ignorance for plausible and varying rationalities. Nothing has been as vehemently contested as the role of the state in the economy, financial intermediation and international investment protection, in a world where the difference between the haves and the have-nots have become utterly deplorable.

In this backdrop, Prof. Prabhash Ranjan, a prolific and distinguished scholar of international investment law teaching at the South Asian University, Delhi, [argues for a non-partisan and systematic appraisal of issues](#), especially concerning the international investment regime. His piece bemoans the 'oversimplification' of the debate, that is unable to 'adequately capture the complexities' exemplified by the 'one-sided' intervention, of certain 'Marxist' and 'Third World' scholars on the nature and structure of international law, and more specifically international investment law. Prof. Ranjan's plea is laudable in its effort to uncover the silos, the blinkers and the indifference that a great many academics, policy makers and practitioners are all too prone to nurture.

As indispensable and perhaps also timely as this exercise may be, I argue that Prof. Ranjan's intervention displays the familiar tone of disregard and repudiation of alternative conceptions and regrettably advances a cause that remains rather 'simplified' and 'myopic' to the point that 'form' eludes 'substance' and 'technicality' trumps any reflection on questions of substantive justice and equality. My response draws on the inherently hierarchical character of international law and the global investment regime while arguing for a 'transformative approach' to the study and practise of international law.

The myth of equal sovereignty

The starting point of Prof. Ranjan's plea is to debunk the idea that India, and perhaps by extension several other developing countries are too accustomed to play the 'victim' card and renege on their obligations, especially after having entered 'voluntarily' through an exercise of 'sovereign function' into investment treaties that contain restrictions on their own public power. The argument rests on the classical assumption under positive international law that all states are 'co-equal' partners comprising the international society where states voluntarily 'consent' to establish and enter into distinct international legal regimes.

This 'formal' reading of equality masks the varying ways in which sovereignty is constructed. and the ways in which it is understood as an exercise of free and unconstrained agency, unaffected by either the 'substance' of economic and political inequality among states or the force of ideational and social conditioning that comes from being a part of an international community of unequal partners. The concept of 'sovereign equality' of states lends credence to the notion of a certain 'flatness' in international relations, blissfully unmindful of history, context and in fact, the reality of politics and power in international engagement.

This approach ignores the chequered foundations of international investment protection as historically a means for traditional capital exporting countries to augment and strengthen their hold on capital importing nations through economic means and financial coercion. It ignores the fact that BITs, with all their claims for equal participation, have invariably been meted out as all in all 'take-it-or-leave-it' proposition (hence, recent efforts by the BRICS to do it differently has been meted with enormous protest). This situation leaves weaker players with little scope for political manoeuvre. Central to the ideational and social conditioning of weaker players has been the sustained and elaborate emphasis on the inherent value of foreign investment for the purposes of economic development, without which neither social progress in domestic affairs nor a place in the international community is likely guaranteed. In this constellation, 'sovereignty', choice and 'voluntariness' mean nothing, but collapse into a singular alternative, i.e. entering and sustaining within a certain investment regime, however unjust or unfair. By ignoring the fact that international law thrives exactly on this myth of equal sovereignty of states, Prof. Ranjan's piece itself embraces 'oversimplification' and advances a cause that is unwilling to uncover the deeper structures of power and dominance inherent the framework of international investment law.

Appreciating the substance of Third world resistance

It is exactly this rejection of 'formalism', pure 'positivism' and 'legalism' that represents a certain kind of Third World Approaches to International Law (TWAIL) scholarship that does not speak of ideologies but for substantive equality and justice in international law. TWAIL is acutely aware of history, oppression and the insidious means of domination that has always characterized social and legal relations in the international community. It speaks to a certain past, only so as to see more clearly how the present structures of society and conditioning is reflective of interests of dominant groups at the expense of others.

Therefore the central objective of TWAIL scholarship as represented through the work of Prof. [Chimni](#) and others is to bring to the fore the perspectives, stories and the voices of the marginalized, oppressed and excluded communities, which international law and especially international investment law chooses to ignore. In this constellation, the '[third world](#)' is more than simply a 'geographic' cluster of states, but represents a 'collective' of interests, issues and forms of resistance of especially those communities and peoples that remain outside the traditional fold of positive international law. Unlike Prof. Ranjan's heavy handed remarks, TWAIL scholars understand that there is always a 'third world' in the first world and a first world in the 'third world', where not everyone is either 'innocent' or a 'victim', but

many certainly are. So when TWAIL scholars, as Prof. Ranjan argues, suddenly 'develop sympathies' for the very state that they would otherwise criticise for abusing public powers, it necessarily means standing up for and echoing the voices of those communities within the several states which remains excluded and disadvantaged. Only the most crude and simplistic version of the concept of 'state' would miss the point that states are not monolithic entities but are a sum of its constituent groups and communities.

Given this understanding, Prof. Ranjan's claim of TWAIL scholars continually trying to 'disengage with the system' not only oversimplifies the debate, but is also patently wrong. The TWAIL movement (I consciously refer to it as such) is both a form of resistance to accounts of international law that it considers to be an extension of the former imperial order and a conscious effort to reform that very system from within, oftentimes using the very rhetoric of positive international law. In this venture, TWAIL scholarship has always been met with suspicion and in several cases with utter contempt. However, TWAIL continues to challenge mainstream international law and practise and is aware that the first task has always been to challenge mainstream international legal scholarship.

On the injustice and inequity of BITs and the many faces of the rule of law

It is indeed through the dominant rhetoric of mainstream positive international law that certain theoretical and doctrinal paradigms have assumed the status of a 'universal good' and which are rarely, if ever, called into question. 'Rule of law' and more recently 'the international Rule of law' (see work of the [KFG research group](#)) is one such paradigm which has become the standard defining feature of a modern sovereign state. While, it is true that the concept of 'rule of law' is remarkable in its potential to equalize power relations between the weak and the strong, and therefore is undoubtedly a pre-requisite for an ordered society, it is also unmistakable that the 'rule of law' has been susceptible in preserving the interests of certain power segments as opposed to others. Therefore, it begs the question, which groups and communities within a society are likely to benefit the most from the principle of 'rule of law' and which communities are still likely to struggle and perhaps even be trampled under the burden of the same principle. This inherent inequity in the 'rule of law' is perhaps most visible with respect to the protection of 'property rights' as forming part of the multitude of BITs.

It is in this context that Prof. Ranjan's most searching critique of India's investment regime, that it has failed to take the 'rule of law' seriously, needs to be looked at. Rightly, as Prof. Ranjan points out, the barrage of high profile BIT claims against India has to do with some of the core aspects of 'rule of law', such as the lack of an effective remedy, delay in enforcement, retrospective application of the law and likewise. These are of crucial importance for all communities within a society who are all likely to be affected. However, inequity inherent in the BIT regime is that it allows certain communities, i.e. foreign investors, to not only use the 'rule of law' as a legitimate basis for dragging the state to arbitral proceedings but also mount claims (and succeed) for compensation for the denial of the same (the case in point, [White Industries](#)). Based on a denial of the 'rule of law' claim, BITs allow foreign investors to use an external legal regime to that of state law as against other potential

stakeholders of a society. The expansive interpretations of investor protection clauses by arbitral tribunals (much criticized), even to the extent of allowing for forum shopping under different BITs, as the *White Industries* shows, brings to the fore the different faces of 'rule of law'. It raises critical questions as to which communities does the 'rule of law' benefit, and which communities have the capacity to set in motion the mechanisms and procedures towards such a remedy. 'Rule of law' in this sense becomes the handmaid for the already powerful and in this case the 'global', while remaining a point of struggle and denial for the rest. Mainstream international law remains oblivious to such questions of power, equity, fairness or justice while taking refuge under 'formal' conceptions of 'sovereign equality' and 'consent' in the international realm.

On the myopia of future reforms

Lastly, calls for 'future reforms' to be meaningful, must question the dogma that 'BITs are an integral element of the legal infrastructure *necessary* for the functioning of the global economy...' when empirical studies ([here](#) and [here](#) for an indicative list only) are at best, ambiguous with respect to the causality between investment treaties and their impact on the volume and direction of real investment into host countries. Going one step forward, our standards of assessing the value of the international investment regime ought to be informed not only by 'how much' cross-border flows of investment one witnesses, but more importantly 'who' ultimately benefits from such a process. This will entail a closer examination of the post-investment phase, where research ([here](#) and [here](#) for indicative list only) has flagged concerns about rising inequality, denudation of livelihoods, and devastation of the environmental and social goals of the host states. The goal of '[embedded liberalism](#)' that the architects of the post-war economic order had envisioned, and to which Prof. Ranjan wholeheartedly subscribes, [never really took off in practice](#) (and that remains one of the criticisms of Ruggi). This was precisely because liberalism, whether embedded or not, fell victim to certain powerful interests percolated within free markets, leaving very little room for state intervention (also represented in the current backlash against the liberal international order). An alternative vision, requires a 'transformative approach' (see [Max Planck project](#)) in which issues of historical injustice, power inequalities and economic marginalisation, are not cloaked in formal terms, but form the central focus of the international investment regime. This requires a 'systemic' approach where different pockets of '[resistance](#)' is embedded as an integral part of the story of international law and institutions, that offers critique not only to specific set of injustices, but to the very structures of power and inequality that underpin the system itself.

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